FILED
APR 5 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1560

SAMMY GARRETT,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	5
STATEMENT OF FACTS	6
REASONS FOR GRANTING THE WRIT:	
1. The Just Compensation Clause Of The Fifth Amendment Is Self-Executing Both In Relation To The States (After Passage Of The Fourteenth Amendment) And The Federal Government. The Eleventh Amendment Is Thus No Bar To Federal Jurisdiction Of Petitioner's Within Wrongful Conviction And Incarceration Suit Against Illinois Based Directly And Exclusively Upon The Just Compensation Clause	7
2. The Historical And Present Plight Of The Erroneously Convicted And Imprisoned Defendant In Anglo-American Law Merits The Court's Attention	18
CONCLUSION	20

APPENDICES:

A—Opinion of the United States Court of Appeals for the Seventh Circuit 1a

B—Judgment Order of the United States Court of Appeals for the Seventh Circuit 5a

C—Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division 6a

LIST OF AUTHORITIES CITED

Cases

Armstrong v. United States, 364 U.S. 40 (1960) 10
Battaglia v. General Motors Corporation, 169 F. 2d 254, 257 (2d Cir. 1948) 14
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) 13
Chicago, Burlington & Quincy Ry. Co. v. Chicago, 166 U.S. 226 (1896) 7
Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257 7
Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 15
Davis v. Passman, ... U.S. ....., 99 S. Ct. 2264, 2275 at n. 20 (1979) 9, 13
Edelman v. Jordan, 415 U.S. 651 (1974) 15
Griggs v. Allegheny County, 369 U.S. 84 (1962) 9
Jacobs v. United States, 290 U.S. 13 (1933) 9
Lake County Estates, Inc. v. Tahoe Reg. Plan, ... U.S. ....., 99 S. Ct. 1171, 1175 (1979) 16
Malloy v. Hogan, 378 U.S. 1, 4-5 (1964) 8
Marbury v. Madison, Cranch 137, 2 L. Ed. 60 7
McDonald v. State of Illinois, 557 F. 2d 596 (7th Cir. 1977) 15
Omnia Commercial Co. v. United States, 261 U.S. 502, 508-510 11
Osborn v. Bank of United States, 9 Wheat. 738, 6 L. Ed. 204 7

Palmer v. Ohio, 248 U.S. 32 (1918) 17
Palmer v. State, 96 Ohio St. 513, 118 N.E. 102 (1917) .. 17
People v. Garrett, 62 Ill. 2d 151, 339 N.E. 2d 753 (1975) 5, 16
Seaboard Airline Railroad Company v. United States, 261 U.S. 299 13
Thompson v. City of Louisville, 362 U.S. 199 (1960) 16
U. S. v. Alabama, 313 U.S. 274, 381-282 11
In re Winship, 397 U.S. 338 (1970) 16

Constitutional Provisions and Statutes

Eleventh Amendment, United States Constitution 3
Fifth Amendment, United States Constitution 3
Fourteenth Amendment, United States Constitution 3
Article 13, Sec. 4, Illinois Constitution of 1970 3
Chap. 37, Sec. 439.8, Illinois Revised Statutes 3

Other Authorities

Jaffe, *Suits Against Governments and Officers: Damage Action*, 77 Harv. L. Rev. 209, 227 (1963) 13
Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J.C.L. and Crim. and P.S. 684 at 691 (1913) 18
Bratholm, *Compensation for Persons Wrongfully Accused or Convicted in Norway*, 109 U.S. of Pa. L. Rev. 833 (1961) 18
Delanger, *Of Rights and Remedies: The Constitution As A Sword*, 85 Harv. L. Rev. 1532 (1972) 14
Goldberg, *Equality and Government Action*, 39 N.Y.U. L. Rev. 205 (1964) 18
Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922 (1976) 14
Sovereign Immunity: Anathema To The Constitutional Tort, 12 Santa Clara Lawyer 543 (1972) 14
2A SUTHERLAND, STATUTORY CONSTRUCTION, pp. 315-321 (1973) 15

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Petitioner prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in this cause.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is set forth as Appendix A. The Opinion of the United States District Court for the Northern District of Illinois is also found as Appendix C.

JURISDICTION

The Court of Appeals' Opinion was rendered and filed on January 7, 1980. No petition for rehearing was filed. This petition is filed within 90 days after entry of judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C 1254(1), 2101(c) and Rule 22.3 of the Rules of this Court.

QUESTION PRESENTED FOR REVIEW

Whether a suit against a state for erroneous and wrongful conviction and imprisonment based directly upon the Just Compensation Clause of the Fifth Amendment is barred by the Eleventh Amendment?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> ". . . private property shall not be taken for the public benefit without just compensation."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "[N]o state shall . . . deprive any person of life, liberty or property without due process of law . . ."

Article 13, Sec. 4 of the Illinois Constitution of 1970, provides:

> "Sec. 4, Sovereign Immunity Abolished except as the General Assembly may provide by law, sovereign immunity in this state is abolished."

Chapter 37, Sec. 439.8, Ill. Rev. Stat. provides, in pertinent part:

> "The court [of claims] shall have exclusive jurisdiction to hear and determine the following matters:
>
> (c) All claims against the State for time unjustly served in prisons of this State where the persons imprisoned shall receive a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for

which they were imprisoned; provided, the court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than $15,000; for imprisonment of 14 years or less but over 5 years, not more than $30,000; for imprisonment of over 14 years not more than $35,000; and provided further, the court shall fix attorney's fees not to exceed 25% of the award granted."

(d) All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit, and all like claims sounding in tort against the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities; provided, that an award for damages in a case sounding in tort shall not exceed the sum of $100,000 to or for the benefit of any claimant. The defense that the State or the Medical Center Commission or the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities Systems or the Board of Governors of State Colleges and Universities is not liable for the negligence of its officers, agents, and employees in the course of their employment is not applicable to the hearing and determination of such claims."

STATEMENT OF THE CASE

This petition invites review of the judgment and opinion of the Court of Appeals for the Seventh Circuit, which affirmed the District Court's dismissal on Eleventh Amendment grounds of Petitioner's Complaint[1] for damages against Illinois for having erroneously convicted and incarcerated him for an extended period on account of a non-existent murder. Invoking general federal question jurisdiction, 28 U.S.C. 1331, Petitioner based his damages claim against Illinois directly and exclusively upon the Just Compensation Clause of the Fifth Amendment as applied to the States through the Due Process Clause of the Fourteenth Amendment. Neither the Court of Appeals nor the District Court reached the merits of Petitioner's aforesaid claim.

Petitioner alleged that, though wholly innocent of any specie of homicide, he nevertheless served five years and seven months of his twenty to forty year, 1970, murder sentence before being released from prison in 1975 because of the outright reversal of his murder conviction by the Illinois Supreme Court. *People v. Garrett*, 62 Ill. 2d 151, 339 N.E.2d 753 (1975).

The basis for the outright reversal was insufficiency of any showing of homicide coupled with deceased's concededly *bona fide* suicide note found at the death scene. *Ibid.* Notwithstanding his innocence, Petitioner has

[1] No. 46-C-4373 (R. #1) "R" refers to the Record on Appeal. There is no Transcript of Proceedings. The case below was decided on the pleadings.

never been pardoned for the homicide by the Governor of Illinois.

While Petitioner also has an action pending in the Illinois Court of Claims for redress of his wrongful incarceration, the applicable state statute limits recovery in such cases to a pitifully and, Petitioner claims, unconstitutionally small amount.[2]

Neither of the lower courts reached this contention either, resting instead on the Eleventh Amendment exclusively. (App. A & C).

STATEMENT OF FACTS

The facts necessary to a resolution of the question presented herein are contained in the Opinion of the Court of Appeals, (App. A) and need not be repeated here.

[2] The statute, Chap. 37, Sec. 439.8, Ill. Rev. Stat., set out *supra* in pertinent part, limits recovery to $15,000 for less than 5 years wrongful imprisonment and to $30,000 for 14 years or less, but over 5 years. Here Petitioner claims 5 years and 7 months, whereas the state would limit such claim to "at most 7 months" (R. #23) since Petitioner was sentenced to a concurrent term of from 1 to 5 years on his companion unlawful use of weapons conviction. (R. #23).

REASONS FOR GRANTING THE WRIT

1.

THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT IS SELF-EXECUTING BOTH IN RELATION TO THE STATES (AFTER PASSAGE OF THE FOURTEENTH AMENDMENT) AND THE FEDERAL GOVERNMENT. THE ELEVENTH AMENDMENT IS THUS NO BAR TO FEDERAL JURISDICTION OF PETITIONER'S WITHIN WRONGFUL CONVICTION AND INCARCERATION SUIT AGAINST ILLINOIS BASED DIRECTLY AND EXCLUSIVELY UPON THE JUST COMPENSATION CLAUSE.

The principal, virtually dispositive authority on these combined constitutional points is *Chicago, Burlington & Quincy Ry. Co. v. Chicago*, 166 U.S. 226 (1896).

Burlington is entitled to special decisional weight here for it was the first of this Court's decisions applying a particular Clause of the Bill of Rights, *viz*, the Just Compensation Clause of the Fifth Amendment, to the States through the Due Process Clause of the Fourteenth Amendment and the Court wrote with appropriate painstaking care, scope and depth, much in the manner of Mr. Chief Justice Marshall when dealing with authoritatively uninterpreted Federal Constitutional provisions in the early years of the Republic. See, e.g., *Marbury v. Madison*, Cranch 137, 2 L. Ed. 60; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257.

Burlington is part of and exemplifies this valued judicial tradition and makes several points authoritatively plain. *Burlington*'s square holding that the Just Compensation Clause of the Fifth Amendment

applies to the States through the Due Process Clause of the Fourteenth Amendment is only the beginning.

Burlington also squarely holds that the Just Compensation Clause applies to the States *ex proprio vigore* and that there is no need of implementing legislation to authorize federal lawsuits, from the Congress or otherwise. *Burlington* thus holds that the Just Compensation Clause is legally as well as facially self-executing.

Burlington's most significant message for present purposes, however, is signalled by the decision's failure ever to mention (let alone discuss) the Eleventh Amendment either generally or in relation to the Just Compensation Clause of the Fifth Amendment. The fact that *Burlington* involved a municipality, *viz*, the City of Chicago, rather than the State itself does not impair this conclusion since *Burlington* could not logically have been decided as it was unless the Just Compensation Clause was first of all made applicable to the States as such and not merely to state-chartered municipal corporations. The Court's expressed intention to do this, moreover, could hardly be plainer, *Burlington* cannot fairly be read any other way.

Recent Supreme Court decisions solidly confirm this reading of *Burlington*. For example, as stated in *Malloy v. Hogan*, 378 U.S. 1, 4-5 (1964):

> "The extent to which the Fourteenth Amendment prevents *state invasion* of rights enumerated in the first eight Amendments has been considered in numerous cases in this Court since the Amendment's adoption in 1868 . . . [T]he view which has thus far prevailed dates from the decision in *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 . . . which held that the Due Process Clause *requires the States to pay just com-*

> *pensation* for private property taken for public use. It was on the authority of that decision that the Court said in 1908 in *Twining v. New Jersey* . . . that 'it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action because a denial of them would be a denial of due process of law.' 211 U.S., at 99, 53 L. Ed. at 106." (emphasis supplied).

The inapplicability of the Eleventh Amendment to suits based directly and exclusively upon the Just Compensation Clause of the Fifth Amendment is also shown by *Griggs v. Allegheny County*, 369 U.S. 84 (1962). In *Griggs*, the failure of the Pennsylvania Supreme Court to compensate the claimant in accordance with proper Just Compensation Clause principles was held to raise a federal question sufficient to give this Court jurisdiction. The Eleventh Amendment was not even considered by the Court.

Jacobs v. United States, 290 U.S. 13 (1933), recently cited with approval and relied upon in *Davis v. Passman*, ... U.S. ... , 99 S. Ct. 2264, 2275 at n. 20 (1979), must also be noted. *Jacobs* implies a private cause of action against the United States directly and exclusively from the Just Compensation Clause of the Fifth Amendment and subordinates the constitutionally-based federal sovereign immunity doctrine to the equitable demands of the Just Compensation Clause. The analogue of federal sovereign immunity on the State side, of course, is the Eleventh Amendment. If, as *Jacobs* holds constitutionally-based federal sovereign doctrine must yield to the more specifically tailored set of values protected by the Just Compensation Clause, so, too, must the Eleventh Amendment yield in the case of suits brought directly under such Clause against the States.

Jacobs itself involved a dam built by the Federal Government which caused periodic flooding of the Plaintiffs' lands. Plaintiffs filed suit in the Federal District Court. This Court on appeal, held that there was a partial taking of plaintiffs' lands for which the Government was bound to make just compensation under the Fifth Amendment and that the rulings of the lower courts, disallowing interest on the judgment could not be sustained.

> "These suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in [Federal Court] in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. *It rested upon the Fifth Amendment. Statutory recognition was not necessary. Such a promise was implied because of the duty to pay imposed by* [*Just Compensation Clause of the Fifth Amendment*]. *The suits were thus founded upon the Constitution of the United States.* 28 U.S.C. Sec. 41(20), now 28 U.S.C. 1343." *Jacobs v. U.S., supra,* p. 15 (emphasis added).

Armstrong v. United States, 364 U.S. 40 (1960), even more than *Jacobs, supra,* illustrates and emphasizes that sovereign immunity doctrine must give way in the case of suits based directly upon the Just Compensation Clause of the Fifth Amendment. *Armstrong* allowed Just Compensation Clause recovery over sovereign immunity objections for plaintiff's loss of certain mechanics liens or vessels which plaintiff had agreed to construct for the Federal Government. Title to the boats passed to the Government on demand made pursuant to contract. Under state law, plaintiffs had valid

mechanics liens which they were unable directly to enforce against the Government because of sovereign immunity doctrine. Suit for the loss of the liens was accordingly instituted against the Government directly under the Just Compensation Clause of the Fifth Amendment. This Court held:

> "Before transfer these liens were enforceable by attachment against the hulls and all materials. After transfer to the United States the liens were still valid, *U.S. v. Alabama*, 313 U.S. 274, 281-282, but they could not be enforced because of the sovereign immunity of the Government and its property from suit . . . The result of all this was, the destruction of all of petitioners' property rights under their liens, although [said] liens were valid and had compensable value. Petitioners contend that the destruction of their liens under the circumstances here is a 'taking.' The United States denies this, largely on the premise that inability of the petitioners to enforce their liens because of immunity of the Government and its property from suit cannot amount to a 'taking.'
>
> It is true that not every destruction and injury to property by governmental action has been held to be a 'taking' in the constitutional sense. *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-510. This case and many others reveal the difficulty of trying to draw the line between what destructions of property by lawful governmental actions are 'consequential' and therefore not compensable . . . [and compensable takings].
>
> This was a taking, not a mere 'consequential incidence' of a valid regulatory measure . . . [This] was because the Government *for its own advantage* destroyed the value of the liens, *something that the Government could do because its property was not subject to suit, but which no private person could have done.* Since this acquisition was for a public

> use, *however accomplished, whether with an intent or purpose of extinguishing the liens or not* [emphasis added], the Fifth Amendment . . . [was abridged]. Neither the boats' immunity . . . from enforcement of the liens nor the use of the contract to take title relieves the Government from its . . . Just Compensation Clause obligation . . .
>
> *The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.* A fair interpretation of this constitutional protection entitles these lien holders to just compensation . . ."

Dissenting, Mr. Justice Harlan focused even more directly than the majority upon the inter-relationship of Just Compensation Clause recovery and Government immunity (including inferentially the bar against suing a state without its consent erected by the Eleventh Amendment). Observing that Just Compensation Clause recovery necessarily supplants the sovereign immunity (Eleventh Amendment) principle *pro tanto*, he only objected that the *Armstrong* majority had so held:

> "In this instance the Government is not exercising its power of eminent domain with the intent and purpose (which the majority of the Court deems immaterial) of extinguishing petitioners' liens; indeed, it has not exercised the power of eminent domain at all. All it has done is exercised its undoubted power to contract and acquire title to the property, the consequent effect of which is to render the liens unenforceable *because of the independent principle of sovereign immunity.* The very nature of the doctrine of sovereign immunity precludes regarding its interposition as a Fifth Amendment 'taking'. *It seems to me that a Court which, having established this im-*

> *munity, then declares that the Government must pay for exercising it, is effectively negativing it.*" (emphasis added).

The principles enunciated in *Jacobs* and *Armstrong* have been consistently reaffirmed by subsequent Supreme Court decisions. Also see *Seaboard Airline Railroad Company v. United States*, 261 U.S. 299. Indeed, the Government's Brief in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), expressly concedes that *Jacobs* held that, "Under the Fifth Amendment a private party had a right of action against the Government for just compensation for the taking of his property." Brief of Respondent, pp. 15-16. *Jacobs* was distinguished by the Government in *Bivens* on the ground that the very language of the Fifth Amendment, in requiring "just compensation", contemplates the payment of money damages. See Jaffe, *Suits Against Governments and Officers: Damage Action*, 77 Harv. L. Rev. 209, 227 (1963). The theme running through *Jacobs*, *Armstrong* and *Bivens* finds its roots in the oft-quoted statement of Mr. Chief Justice Marshall:

> "The Government of the United States has been consistently termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws provide no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

Davis v. Passman, ... U.S. ....., 99 S. Ct. 2264 (1979), which implies a cause of action directly from the Due Process Clause of the Fifth Amendment, made a similar point only last Term:

> "[W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless

> such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and *who at the same time have no effective means other than the judiciary to enforce these rights*, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Ibid*, at ..... U.S. ....., 99 S. Ct. 2264, 2275 (1979). (emphasis added).

Moreover, it is both well-established and persuasive of the proper result here "that the exercise by Congress over its control of jurisdiction [of the Federal Courts] is subject to compliance with *at least the requirement of the Fifth Amendment.* That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of [Federal] Courts other than the Supreme Court, *it must not so exercise that power as to . . . take private property without just compensation.* [citing numerous cases]" *Battaglia v. General Motors Corporation*, 169 F.2d 254, 257 (2d Cir. 1948). See generally Delanger, *Of Rights and Remedies: The Constitution As A Sword*, 85 Harv. L. Rev. 1532 (1972); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922 (1976); Note, *Sovereign Immunity: Anathema To The Constitutional Tort*, 12 Santa Clara Lawyer 543 (1972).

Again, the contention, erroneously accepted below, that this lawsuit, directly and exclusively based on the Just Compensation Clause of the Fifth Amendment, which expressly provides for a damage remedy against the Sovereign, is nevertheless barred by the Eleventh Amendment, defies logic as well as elementary canons of constitutional (documentary) construction. Entirely aside from the point that the Eleventh Amendment does not

literally even touch this case (a suit by a citizen of Illinois against his own state), it is axiomatic that a general prohibition (such as the Eleventh Amendment) does not wipe out previously-established specific exceptions (such as the express Fifth Amendment damage remedy against the Sovereign) unless the draftors' intention to do so is unequivocally made plain. Otherwise, as here, such exceptions are to be construed *in pari materia* with the general prohibition in order to save the exception and give effect to both provisions. 2A SUTHERLAND, STATUTORY CONSTRUCTION, 315-321 (1973). Especially is this true where the real or imagined evil giving rise to the subsequently enacted general prohibition has nothing to do with the *raison d'etre* of the exception. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which gave rise to the Eleventh Amendment, in no way dealt with the Just Compensation Clause damage remedy against the Sovereign and there is not the slightest historical or other evidence that the Eleventh Amendment was ever intended to affect private lawsuits against the Sovereign directly based on such Clause.

The reliance of the Courts below upon *Edelman v. Jordan*, 415 U.S. 651 (1974) and *McDonald v. State of Illinois*, 557 F.2d 596 (7th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977) is misplaced.

Edelman was a Due Process Clause case wherein plaintiffs in effect sought damages against Illinois for wrongfully withholding certain disability benefits. No government "taking" of plaintiffs' property or other Just Compensation Clause question was even involved. Indeed, as stated, plaintiffs in *Edelman* sought damages for the alleged non-receipt of government benefits.

McDonald, supra, while involving, as here, an erroneously convicted murder defendant seeking damages from the state for his resultant incarceration, is similarly in no way bottomed on the Just Compensation Clause. Indeed, no Just Compensation Clause question was ever briefed, argued or mentioned by counsel in that case, cf. *Lake County Estates, Inc. v. Tahoe Reg. Plan,* ..... U.S. ....., 99 S. Ct. 1171, 1175 (1979), and forms no part of the opinion of the Court of Appeals in that case. Plaintiff, *McDonald* instead posited a Due Process right under the Fourteenth Amendment to be free from incarceration by his state as an erroneously convicted murderer and a derivative alleged Equal Protection Clause right against any state limitations of his damages in the same manner as "citizens . . . [suffering] *other forms of tortious conduct* at the hands of the state." (R. #26) (emphasis added).

Moreover, *McDonald* is simply not this case in relation to the Just Compensation Clause and the Eleventh Amendment. Even assuming for argument that Just Compensation Clause relief in *McDonald* would have been barred by the Eleventh Amendment, *McDonald* was a case of reasonable though mistaken identity by the state whereas the instant case is one which respondent's highest court unanimously held should never have been submitted for decision on the merits in the first place. *People v. Garrett,* 62 Ill. 2d 151, 339 N.E.2d 753 (1975). Probably no homicide was ever committed by anybody; certainly the evidence was found constitutionally insufficient to convict Petitioner. *In re Winship,* 397 U.S. 358 (1970); also cf. *Thompson v. City of Louisville,* 362 U.S. 199 (1960). Whatever the proper result under the Eleventh Amendment for reasonable though mistaken identity cases such as *McDonald,* Just

Compensation Clause recovery is and ought to be mandated under such Amendment. Whenever, as here, the State, with full knowledge of all evidentiary facts, elects to gamble with the defendant's liberty and obtains a conviction later set aside by its Highest Court for want of constitutionally sufficient submissible evidence of guilt.

While it is true that this Court held in *Palmer v. Ohio*, 248 U.S. 32 (1918) that plaintiffs in that case had no remedy under the Just Compensation Clause of the Fifth Amendment because of the Eleventh Amendment, *Palmer* is not determinative here for several reasons. In the first place, no intentional taking by the state was involved in *Palmer*; only an inadvertent flooding of plaintiffs' lands resulting from Ohio's elevation of a spillway. The purely common law negligence basis of *Palmer* (plainly barred by the Eleventh Amendment) is made abundantly clear from the statement of facts set forth in the Opinion of the Ohio Supreme Court. *Palmer v. State*, 96 Ohio St. 513, 118 N.E. 102 (1917). Moreover, this Court has not cited or relied upon *Palmer* in decades and the decision has been but sparingly cited by the lower courts. Suggestively, neither the District Court nor the Court of Appeals relied upon *Palmer* in the present case.

In sum, suits based directly and exclusively upon the Just Compensation Clause of the Fifth Amendment are an exception to the Eleventh Amendment's bar to private suits against the States in Federal Court. They have to constitute an exception. Otherwise the Just Compensation in relation to the States would be only a group of hollow, high-sounding words. Such Clause would no longer be an effective part of the Bill of Rights. The Just

Compensation Clause in relation to the States would have been written out of the Constitution.

2.

THE HISTORICAL AND PRESENT PLIGHT OF THE ERRONEOUSLY CONVICTED AND IMPRISONED DEFENDANT IN ANGLO-AMERICAN LAW MERITS THE COURT'S ATTENTION.

The traditionally remedyless plight of erroneously but constitutionally convicted and imprisoned defendants in Anglo-American law has been the subject of appropriately severe and responsible professional legal criticism over the years. While Jeremy Bentham was the first Anglo-American champion of the doctrine of required government indemnity for errors of criminal justice, he was followed by numerous other eminent legal scholars, most notably by the late Professor Borchard of Yale. Bentham himself considered the state's obligation to compensate innocent victims of criminal prosecution so obvious that any attempt to demonstrate it could only obscure it. The history is related in detail by Borchard in Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J.C.L. and Crim. and P.S. 684, especially at 691 (1913). Also see Bratholm, *Compensation for Persons Wrongfully Accused or Convicted in Norway*, 109 U.S. of Pa. L. Rev. 833 (1961) and accompanying note dealing with state and federal law in the United States, p. 845; and Goldberg, *Equality and Government Action*, 39 N.Y.U.L. Rev. 205 (1964).

Suffice it to say that most European and other legal systems have dealt with the erroneously convicted and imprisoned defendant much more fairly and generously than our own. The matter of just compensation for inno-

cent convicted criminal defendants is in many states still exclusively handled by (private) legislative bill, with all that this procedure implies, while other states, such as Illinois, have statutes granting typically inadequate relief. Thus, while a recent national public opinion poll shows that most Americans would not be willing to suffer penal incarceration for one year for less than 1.8 Million Dollars, the Illinois Court of Claims Act provides the following schedules of *maximum* recoveries: Not more than $15,000 for serving five years or less; $30,000 maximum for serving six through fourteen years; and a maximum of $35,000 for those doing more than fourteen years. Notwithstanding such woefully limited authorized recoveries, statutes of the Illinois type have been given an extremely narrow construction.

This Court and individual Justices, present and past, have often convincingly shown in a variety of contexts over the years that the criminal justice system is not designed principally to benefit criminals. Yet the contrary notion popularly persists. One reason may well be the accurate popular public conception of what typically happens to innocent persons like petitioner erroneously convicted and imprisoned for serious crimes they never committed, especially where, as here, probably no crime was committed at all.

With all deference it is no credit to the educative function of this Court that it has taken almost two centuries for the question arising herein to be properly presented, when most citizens would regard it as going to the heart of fairness of the criminal justice system.

CONCLUSION

For all of the foregoing reasons, certiorari should issue to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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April 4, 1980

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SAMMY GARRETT,

Plaintiff-Appellant,

No. 78-2568 *v.*

STATE OF ILLINOIS,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 4373—**John Powers Crowley**, *Judge.*

HEARD SEPTEMBER 27, 1979—DECIDED JANUARY 7, 1980

Before FAIRCHILD, *Chief Circuit Judge*, BAUER, *Circuit Judge*, and CAMPBELL, *Senior District Judge.**

BAUER, *Circuit Judge.* Appellant was convicted of murder and unlawful use of weapons in the Circuit Court of Cook County, Illinois, in 1970. He was sentenced to concurrent terms of 20 to 40 years for the murder convictions and one to five years for the weapons conviction. The Illinois Supreme Court reversed the murder conviction in 1975. *People v. Garrett*, 62 Ill. 2d 151, 339 N.E.2d 753 (1975). Appellant was

* The Hon. William J. Campbell, Senior Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

released from custody after serving five years and seven months of his sentence.

In November 1976, appellant filed a complaint against the State of Illinois and various state officials alleging that his incarceration violated the just compensation clauses of the Illinois and United States Constitutions. Garrett alleged that

> his right and opportunity to work and earn income, his loss of reputation insofar as it relates to employment and/or business opportunities, [and] his loss of consortium and association with his wife, family and business associates

was property taken from him for which he should be compensated under the Fifth Amendment. Garrett also alleged that the Illinois statute governing wrongful imprisonment claims, Ill. Rev. Stat. ch. 37, § 439.8, was unconstitutional. Appellant sought monetary damages and declaratory relief.

The individual defendants were voluntarily dismissed from the suit, and the State of Illinois moved to dismiss the complaint for lack of jurisdiction. In an unpublished opinion, the district court granted the motion on the grounds that the Eleventh Amendment barred an action seeking money damages from the state. We affirm.

Our decision in *McDonald v. Illinois*, 557 F.2d 596 (7th Cir.), *cert. denied* 434 U.S. 966 (1977), controls the disposition of this appeal. McDonald had served two years of a murder sentence when another man confessed to the crime. After his release from prison, McDonald sued the State of Illinois for damages, claiming his wrongful imprisonment violated his rights under the Fourteenth Amendment. Following the Supreme Court's decision in *Edelman v. Jordan*, 415 U.S. 651 (1974), we held that the Eleventh Amendment barred the action unless the state had waived its immunity. In determining whether Illinois had consented to be sued, we examined the same act attacked here. The Illinois Court of Claims Act, Ill. Rev. Stat. ch. 37, § 439.8, waives sovereign

immunity for wrongful imprisonment actions in limited circumstances and grants jurisdiction for such suits only in the Illinois Court of Claims. Since a state can limit the extent of its amenability to suit, *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), we held that Illinois had not waived its sovereign immunity for proceedings in federal court. We accordingly affirmed the dismissal of McDonald's complaint.

Appellant argues that *McDonald* is not applicable because he sues for a deprivation protected directly by the Constitution. The Just Compensation Clause of the Fifth Amendment, he contends, should be applied through the Fourteenth Amendment to impose monetary liability upon a state without regard for the Eleventh Amendment.

We reject appellant's contention. Even though the Fifth Amendment alone may support a cause of action for damages against the United States, *Jacobs v. United States*, 290 U.S. 13 (1933), the Eleventh Amendment stands as an express bar to federal power when a similar action is brought against one of the states.[1] The Supreme Court has recently reaffirmed that state immunity from suits for money damages may only be set aside when it consents, *Alabama v. Pugh*, 438 U.S. 781 (1978), or when Congress acts under section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). *Fitzpatrick* held that

> Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

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[1] While by its terms limited to suits commenced or prosecuted against a state by citizens of another state, the Eleventh Amendment has long been construed to prohibit suits for damages against a state by its own citizens. *Edelman v. Jordan*, 415 U.S. 651 (1974) (and cases cited therein); *Jackson Sawmill Co. v. United States*, 580 F.2d 302, 309 (8th Cir. 1978), *cert. denied* 439 U.S. 1070 (1979); *Cf. Lake County Estate, Inc. v. Lake Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

Congress has not provided for damage actions against the states to redress the wrongs complained of here.[2] Several cases cited by appellant rest on 42 U.S.C. § 1983, which was held in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), to apply to municipalities and other political subdivisions of the states. None of these cases concern the immunity of the state itself, which rests squarely on the Eleventh Amendment. Indeed, the Supreme Court decided only last term that Congress did not intend to wipe away the states' immunity when it enacted 42 U.S.C. § 1983. *Quern v. Jordan*, 440 U.S. 332 (1979).

Since the State of Illinois has not conceded our power to consider the merits of appellant's claim, nor has the Congress acted, appellant's suit for money damages against the State of Illinois is barred by the Eleventh Amendment.

Appellant also advances arguments addressed to the constitutionality of the Illinois Court of Claims Act. We follow another part of our decision in *McDonald* that only the Illinois courts can assess the constitutionality of its own statute in the first instance. *McDonald v. Illinois*, 557 F.2d 596, 601 (7th Cir. 1977). Accordingly, we will not address the constitutional challenges asserted by appellant.

The decision of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[2] In saying this, we do not imply that plaintiff's claim is necessarily meritorious.

APPENDIX B

Opinion by Judge Bauer

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

January 7, 1980

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. WILLIAM J. CAMPBELL, *Senior District Judge**

SAMMY GARRETT,

Plaintiff-Appellant,

No. 78-2568 *v.*

STATE OF ILLINOIS,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-4373—**John Powers Crowley**, *Judge*.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

* The Honorable William J. Campbell, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SAMMY GARRETT,

Plaintiff,

No. 76 C 4373 *v.*

STATE OF ILLINOIS,

Defendants.

MEMORANDUM OPINION AND ORDER

JOHN POWERS CROWLEY, *District Judge*

Sammy Garrett was indicted for the offenses of murder and unlawful use of weapon. Following a bench trial in the Circuit Court of Cook County, where plaintiff was represented by retained counsel, he was found guilty of both offenses. The Circuit Court imposed a sentence of 20 to 40 years on the murder charge and a concurrent sentence of one to five years on the unlawful use of weapons charge. More than two years after conviction and sentence Garrett filed a post-conviction petition. He alleged, *inter alia*, that he had been denied effective assistance of counsel, because of failure to adequately cross-examine the State's pathologists and failure to call pathologists in his own defense. He claimed that, if properly defended, it would have been established that the deceased was not a victim of murder, but rather a suicide. The petition was denied.

An appeal from that denial was consolidated with the direct appeal.[1] The Appellate Court reversed the denial of the post-conviction petition and remanded with directions to hold a hearing. The Court also vacated the judgment of conviction and remanded the case to the Circuit Court for further proceedings after the hearing on the post-conviction petition. *People v. Garrett*, 26 Ill. App. 3d 786, 326 N.E. 2d 143 (1975).

The State appealed from this decision. The Supreme Court, after an exhaustive review of the evidence, held that the State had failed to prove the guilt of the defendant beyond a reasonable doubt. Accordingly, the judgment was reversed. *People v. Garrett*, 62 Ill. 2d 151, 339 N.E. 2d 753 (1975). The defendant was then released from custody. He served five years and seven months.

Garrett then filed this action. He requests damages under the just compensation clause of the Fifth Amendment (Count I); damages under the just compensation clause of the Illinois Constitution (Count II); a declaratory judgment that Chapter 37, Section 439.8 Ill. Rev. Stat. is unconstitutional under the just compensation clause of the Fifth Amendment (Count III); and unconstitutional under the just compensation clause of the Illinois Constitution (Count IV).

Presently pending before the Court is the motion of the State of Illinois to dismiss for lack of jurisdiction.[2]

It is clear that this action seeks to impose a liability on the State of Illinois and therefore the Eleventh Amendment bars such an action unless the State has given its consent. *Edelman v. Jordan*, 415 U.S. 651 (1974). The State of Illinois has given its consent to be sued, for wrongful imprisonment, only in the Court of Claims. Chap. 37 Ill. Rev. Stat. § 439.8. In determining this

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[1] Garrett did not appeal the conviction for unlawful use of weapons.

[2] The plaintiff has moved to voluntarily dismiss the individual defendants. That motion is granted.

Court's jurisdiction to hear such an action, we are bound by the decisions of the Court of Appeals for this Circuit. In *McDonald v. Illinois*, 557 F. 2d 596 (7th Cir., 1977), the Court, considering a similar claim under the due process clause held:

> In considering whether or not plaintiff's suit against the State of Illinois is barred by sovereign immunity, we begin our analysis by noting that plaintiff does not challenge the decision of the General Assembly of Illinois to limit the forum in which the state can be sued. Indeed, we do not think plaintiff could successfully challenge this limitation. It has long been recognized that states can limit their waiver of sovereign immunity to actions brought in their own courts and, indeed, even as to particular state courts. *See e.g., Petty v. Tennessee Missouri Bridge Commission*, 359 U.S. 275 (1950). Thus, we must conclude that even if we were somehow empowered to render a decision on the constitutionality of the Illinois law limiting the amount of recovery in cases of wrongful imprisonment brought against the state, we would still have no power to consider the merits of plaintiff's substantive case or to award damages because State of Illinois has in no way conceded to us the power so to act. Section 439.8 is quite specific in limiting jurisdiction in cases such as this to the Illinois Court of Claims. It is the Illinois Court of Claims alone then that can consider the merits of plaintiff's case. And so, we believe it must be the Court of Claims that considers the constitutionality of any attempt by the state legislature to limit the amounts it can award in damages.
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> * * *
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> Accordingly, without expressing any view as to the merits of plaintiff's claim, we affirm the dismissal of the district court as to the State of Illinois because we conclude that exercise of federal jurisdiction is barred by the Eleventh Amendment.

Therefore, it is clear that this action is barred by the Eleventh Amendment. Accordingly, the motion to dismiss is granted and judgment is entered in favor of the defendant and against the plaintiff.

/s/ _____
JOHN POWERS CROWLEY
United States District Judge

DATED: October 30, 1978.